IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1632

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, HELPERS AND WAREHOUSEMEN OF AMERICA,

Petitioner,

—against—

THE BOHACK CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Truck Drivers Local Union No. 807, I.B.T., Petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW.

The initial opinion of the court of appeals (App. A, infra, pp. 1a-42a), dated August 9, 1976, is reported at 541 F. 2d 312. That decision remanded the following issues for determination by the bankruptcy referee:

> "(1) whether to affirm the contract or whether the debtor has so conformed to the contract as to make it binding. See In re Public Ledger, Inc., 161 F.2d 762, 767 (3rd Cir. 1947), cited with approval in REA Express, Inc., supra. 523 F.2d at 170; (2) whether to grant the debtor's petition to reject the agreement as onerous, adhering to our admonition in Keven Steel to 'move cautiously in allowing rejection of a collective bargaining agreement,' 519 F.2d at

> 707; and (3) whether to order arbitration under its terms in any event, and on what issue." [Emphasis added].

The bankruptcy court on May 28, 1976, had rejected the labor agreement between The Bohack Corporation ("Bohack") and Petitioner (App. B., infra, pp. 43a-44a). On October 15, 1976, the bankruptcy referee issued an order directing the Petitioner to submit its grievances with Bohack to arbitration. (App. C, infra, pp. 45a-46a). On October 21, 1976, the referee signed a second order setting forth additional issues to be submitted to arbitration (App. D, infra, pp. 47a-51a). The opinion of the district court, on appeal from the above bankruptcy court orders (App. E, infra, pp. 52a-98a), is reported at 431 F. Supp. 646. The court of appeals affirmed on the opinion of Chief Judge Mishler of the district court. The per curiam opinion of

the court of appeals (App. F, infra, pp. 99a-100a) is reported at 567 F. 2d 237.

JURISDICTION

The judgment of the court of appeals, (App. G, infra, pp. 101a-102a) was entered on December 14, 1977. A timely petition for rehearing was denied on February 16, 1978 (App. H, infra, pp. 103a-104a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does a bankruptcy court have authority to reject a collective bargaining agreement which the debtor-in-possession ("DIP") recognized and applied for almost one (1) year following the filing of the Chapter XI petition.

2. Does a bankruptcy court have, pursuant to Rule 919(b) of the Rules of Bankruptcy Procedure, the authority to disapprove submission of an arbitrable dispute to a labor agreement's grievance procedure.

3. Does a bankruptcy court have, pursuant to 301(a) of the Labor Management Relations Act, the authority to determine which of two contractual grievance forums shall hear and decide a grievance.

STATUTES INVOLVED

This case involves the interpretation and application of

1. Section 313(1) of the Bankruptcy Act, 11 U.S.C. 713(1), and Rule 919(b) of the Rules of Bankruptcy Procedure.

2. Sections 8(d), 203(d) and 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. 158(d), 173(d) and 185(a). All of

these statutes are printed in Appendix I, infa., pp. 105a-111a.

STATEMENT OF CASE

On July 30, 1974, Bohack filed a Chapter XI petition under the Bankrutpcy Act, 11 U.S.C. 701 et. seq. The bankruptcy referee, that same day, issued an order which permitted Bohack to continue its business operations as a DIP. At that time Bohack owned or leased approximately 140 retail supermarkets and a warehouse-distribution terminal servicing two boroughs of New York City, as well as Nassau and Suffolk Counties.

The tractors and trailers used by these drivers were owned by Truck Fleets of New York, Inc. ("Truck Fleets") and leased to Bohack (R. 432a).[1] Truck Fleets was a wholly owned subsidiary of Bohack and the sole source of business for it (R. 432a-433a).

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1 For the convenience of the Court, all page references in this petition will be to the Appendix filed by Petitioner in the court of appeals and will be designated as (R. ...).

During the period between July 30, 1974 and December 15, 1974 the DIP's delivery operations continued unchanged from what they had been prior to the Chapter XI petition, including the continued employment of the same truck drivers. On December 16, 1974 the DIP closed its produce, dairy and bakery warehouses[2] and began receiving that merchandise from Shopwell, Inc. ("Shopwell"), a food wholesaler with warehouse facilities in the Bronx, New York. Approximately sixty (60) of Bohack's drivers lost their jobs as a result of Bohack permitting Shopwell

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2 Local 852, I.B.T. represented the warehousemen in the produce, grocery and dairy warehouses. The meat and delicatessen warehouse employees were covered by a labor agreement between Bohack and Local 174 of the Amalgamated Butchers of North America (R. 357a). All of these warehouse buildings were located in the same terminal complex known as Bohack Square.

drivers to deliver the produce, dairy and bakery items to Bohack's retail stores (R. 120a).[3] The Shopwell drivers were operating the same tractors and trailers that Truck Fleets had been leasing to Bohack. As of December 16, 1974, Truck Fleets leased approximately 32 tractors and 44 trailers to Shopwell in order to complete these deliveries (R. 434a).

On December 16, 1974, Petitioner filed a grievance with the New York City Joint Area Local Committee ("Committee") pursuant

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3 Subsequent to the filing of the Chapter XI petition the DIP and Shopwell entered into an agreement whereby Shopwell was to provide all the merchandise, sold by it to the DIP, F.O.B. the Shopwell warehouse (R. 467a). Although, under the terms of that agreement, the DIP was to pick up that merchandise at Shopwell's warehouse the DIP laid off 60 of its own drivers and permitted Shopwell employees to make deliveries to its stores.

to Article 45, Section 1 of the National Master Freight Agreement and New Jersey-New York Area Supplement thereto ("Agreement").[4] The Committee has jurisdiction over such disputes and grievances in accordance with the procedure set forth in Article 46 of the Agreement (R. 41a).[5] Petitioner contended that DIP's failure to use its own drivers was a controversy that was subject to the Agreement's grievance procedure (R. 11a).

During January, 1975, the DIP's decision was to discontinue warehousing all groceries at Bohack Square and, thereafter, its remaining drivers picked up groceries for the

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4 Bohack and Petitioner were signatories to the Agreement. The term thereof was from July 1, 1973 to March 31, 1976.

5 Article 46, Section 1 provides that grievances, involving "any controversy that might arise," that are not adjusted between the parties to the Agreement are to be submitted to the Committee for settlement (R. 42a).

retail stores from two grocery wholesalers, Bozzuto's, Inc. ("Bozzuto's"), located in Cheshire, Conn.[6] and Filigree Foods, Inc. ("Filigree"), located in Totowa, New Jersey. The trailers carrying these groceries were brought back to Bohack Square and dropped in the parking area. The following day the groceries were delivered by the DIP's truck drivers to the retail stores (R. 377a-378a).

During May, 1975, the DIP was unable to continue purchasing groceries from Filigree because it too had filed a Chapter XI petition. The grocery volume that formerly was obtained from Filigree was, thereafter, split between Bozzuto's and

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6 For approximately three months prior to Bohack's Chapter XI petition its drivers picked up some groceries from Bozzuto's (R. 365a). Those groceries were returned to Bohack Square and unloaded into the grocery warehouse (R. 377a-378a).

Krasdale Foods, Inc. ("Krasdale"), another grocery wholesaler located in the Bronx, New York. The Krasdale volume was delivered directly to the retail stores by Krasdale's drivers (R. 378a-379a). The increased Bozzuto volume continued to be delivered by the DIP's drivers from Cheshire to the retail stores.

The Committee rendered an award on Petitioner's grievance on May 16, 1975. It instructed the DIP to "cease and desist forthwith from having its bargaining unit work subcontracted out" (R. 56a). The DIP totally disregarded this mandate. It altered its grocery agreement with Bozzuto in early June, 1975. Thereafter, the DIP's drivers no longer picked up those groceries. Bozzuto's drivers delivered the grocery trailers to Bohack Square and the DIP's

drivers delivered the loads to retail supermarkets. This change in operations caused a further substantial reduction in the DIP's, driver, seniority list and their work opportunity (R. 383a).

On or about May 27, 1975, Petitioner moved to confirm the Committee's May 16, 1975 award in a proceeding instituted in the Supreme Court of the State of New York, County of Queens. On or about June 5, 1975 the DIP removed that proceeding to the District Court for the Eastern District of New York. The suit was pending when the DIP, still refusing to obey the order, laid off a third group of drivers and advised Petitioner of its intention to discharge its remaining truck drivers. At this point, the Petitioner called a strike against the DIP and began picketing its

retail supermarkets. The DIP, on June 30, 1975, requested and obtained, from the bankruptcy court, a preliminary injunction prohibiting the Petitioner's strike activity.[7] With a broad injunction order in hand-thereby effectively disarming the Petitioner-the DIP, on July 18, 1975, notified its remaining 32 truck drivers that they were terminated, effective the end of that day (R.73a). Also on that date, the DIP moved, by order to show caused, to have the bankruptcy court reject the Agreement (R. 59a-62a).

On Monday, July 21, 1975, Bozzuto drivers began delivering groceries

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7 The bankruptcy court based its jurisdiction, to grant the DIP its requested injunctive relief, on section 301 of the LMRA, 29 U.S.C. §185. The district court vacated that injunction on the ground that a bankruptcy court does not have jurisdiction to grant injunctive relief in labor disputes. The Second Circuit expressed doubt whether "a Bankruptcy Judge ever has [such] jurisdiction," 541 F. 2d at 318, but did not otherwise confront the issue.

directly from Cheshire to the DIP's retail markets and Shopwell drivers started delivering meat directly from its warehouse to those stores (R. 383a, 386a). After July 18, 1975 the DIP received all of its deliveries on Truck Fleet equipment, bearing the DIP's markings, and operated by Bozzuto and Shopwell drivers.[8]

Petitioner appealed to the district court to lift the bankruptcy court's preliminary injunction; it also filed a separate action under Section 301(a) LMRA seeking specific performance of

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8 During September, 1975 the DIP discontinued using Shopwell as its wholesaler for produce, meat, dairy and bakery. From September until March 31,1976-the expiration date of the Agreement-the DIP purchased those items from Hills Supermarkets, Inc. ("Hills"). For that period those deliveries were made to the DIP's stores by use of Truck Fleet tractors and trailers operated by Hills drivers.

the Agreement and an order compelling submission of the dispute to the Agreement's grievance procedure (R. 67a). The DIP's answer to the new complaint included a counterclaim alleging that bankruptcy court approval was necessary before these disputes could be sumitted to the Agreement's grievance procedure (R. 72a-77a). That counterclaim expressly acknowledged assumption of the Agreement by the DIP and sought a permanent injunction compelling the Petitioner to specifically perform in accordance with its terms.

These actions were consolidated and disposed of by the district court: The Petitioner's original petition to confirm the Committee's award, as well as its subsequent suit to compel arbitration, was dismissed; the bankruptcy court's preliminary

injunction was vacated, but a new temporary restraining order took its place;[9] and the issue whether the DIP should be allowed to arbitrate was remanded to the bankruptcy court for resolution.

In a consolidated action before the Second Circuit, the Petitioner appealed its petition to enforce the Committee's award and invoked the circuit court's mandamus jurisdiction to direct the district court (1) to dissolve the strike injunction; (2) to stay the remand to the bankruptcy court; and (3) to compel the grievance procedure provided for in the Agreement. Petitioner's only success was achieved by convincing the Second Circuit that the strike injunction should be dissolved.[10] The circuit court remanded the following issues for determination by the bankruptcy court:

> (1) whether to affirm the Agreement, or whether the DIP has so conformed to the Agreement as to make it binding,
> (2) whether to grant the DIP's petition to reject the Agreement as onerous, and
> (3) whether to order arbitration under the Agreement's terms in any event, and on what issues.

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9 The DIP submitted a proposed temporary restraining order to the district court on August 1, 1975 (R. 78a-79a). The temporary restraining order was signed on November 19, 1975. It "restrained and enjoined [Petitioner] from conducting a strike, walkout or work stoppage or establishing a picket line at [DIP's] various places of business or at the premises of any other party or person doing business with [DIP]." This order was vacated by the Second Circuit in Truck Drivers Local 807 v. Bohack, supra.

10 Since neither the bankruptcy court nor the district court had ordered the DIP to arbitrate, the district court's injunction had been issued without jurisdiction and was therefore void. Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970).

For the services performed by its drivers during the period between July 30, 1974 and July 18, 1975 the DIP complied with the economic terms and conditions of the Agreement. The wage rates were paid, dues were checked off and remitted to Petitioner, paid vacation was received,[11] seniority was recognized, health and pension contributions were paid and both Petitioner and DIP participated in grievance discussions and proceedings (R. 255a, 346a-347a). As a direct result of DIP terminating those drivers they lost their seniority, health and pension coverage, as

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11 The accrued vacation credits earned by the drivers during the pre Chapter XI period were totally recognized and the entire benefit paid by the DIP to each eligible driver. This included an additional week's pay for each driver with 15 years or more of seniority with Bohack and DIP and 2 weeks pay for a driver with 20 or more years of such service (R. 49a).

well as the other benefits set forth in the Agreement (R. 335a).

The bankruptcy court on May 28, 1976, adjudged that the Agreement's terms constituted an onerous burden to the DIP "and a peril to its rehabilitation efforts"(R. 113a). In his orders of October 15 and 21, 1976, the bankruptcy referee set forth the issues to be decided by arbitration and the bankruptcy procedure to be followed by DIP-Petitioner in selecting the arbitrator. (R. 114a, 115a-116a).

On April 21, 1977 the district court affirmed the bankruptcy referee's rejection of the Agreement, and so much of the October 21, 1976 order of that court which directed the arbitrator to decide:

a) The extent of damages to be recovered by the discharged employees upon the rejection of the labor contract between Bohack and [Petitioner].
b) The amount and extent of pension, health insurance, welfare, vacation benefits and the value of seniority of each employee effected by said rejection of the employment contract.
c) The amount of mitigation of such damages by the reason of the subsequent employment of each employee or the receipt of unemployment insurance paid to said employee.

The remainder of the bankruptcy referee's October 21, 1976 order was reversed by the district court. The district court's order directed that the arbitration procedure should be in accordance with the Agreement's procedure and not that set forth in Section 26 of the Bankruptcy Act. (R. 137a-142a,

150a-151a).[12] The Second Circuit affirmed on the opinion of the district court.

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12 Footnote 6 of the district court's Memorandum of Decision does not direct DIP and Petitioner to submit their dispute to the Committee (R. 149a). However, the court did acknowledge that the Petitioner had withdrawn its allegation that DIP violated Article 32 of the Agreement. The issue which the bankruptcy court ordered to be submitted to arbitration in his October 15, 1976 order was:

> "Whether truck deliveries of produce, groceries, dairy, meat and bakery products to the [DIP's] stores for the period between December 16, 1974 and March 31, 1976 by persons other than truck drivers employed by the debtor-in-possession violated the [Agreement] i.e., Article 40, Section 4(a); Article 50, Section 2 and paragraph 2 of the rider thereto." The district court reversed and vacated the October 15, 1976 order.

Dispite the bankruptcy court's limitation of the dispute to allegations against DIP that are within the Supplement section of the Agreement (R. 37a-55a) and the clear instruction of Articles 45, Section 1 and 46, Section 1 of the Agreement (R. 41a-44a), the district court held that if the DIP disagrees with submitting the dispute to the Committee that "the bankruptcy court will have to determine the appropriate committee for arbitration." (R. 149a)

REASONS FOR GRANTING THE WRIT

The Petition Presents Important Unresolved Issues of Apparent Conflict Between Federal Labor and Bankruptcy Laws

A. Rejection of Debtor's Labor Agreement.

When a debtor is permitted to reoganize under Chapter XI of the Bankruptcy Act, 11 U.S.C. 701 et. seq. and the DIP seeks to reject the debtor's labor agreement-pursuant to Section 313 (1) of the Bankruptcy Act[13]-which for approximately twelve (12) months theretofore the DIP applied to its employees, a conflict arises between the federal labor and bankruptcy laws.

A Chapter XI proceeding permits a financially troubled company to avert collapse and liquidation by affording the debtor an opportunity to continue operation of its business under a self-proposed but judicially approved arrangement with its unsecured creditors. An

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13 11 U.S.C. §713(1).

advantage within the reach of such a debtor is the likelihood of the bankruptcy court to reject burdensome executory contracts, including collective bargaining agreements.[14]

The Second Circuit is the first federal appellate court to hold that a DIP can disaffirm a labor agreement as an executory contract. Local 454 v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975). The

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14 An executory contract within the meaning of the Bankruptcy Act has been defined as

> "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Countryman, "Executory Contracts in Bankruptcy: Part I," 57 Minn. L. Rev. 439, 460 (1973).

principal had previously found judicial favor but only at the district court level. E.g., In re Overseas National Airways, Inc., 238 F. Supp. 359 (E.D.N.Y. 1965) (dictum); In re Klaber Bros., Inc., 173 F. Supp. 83 (S.D.N.Y. 1959). See also In re Mamie Conti Gowns, Inc., 12 F. Supp. 478 (S.D. N.Y. 1935). The Kevin Steel court reasoned that a DIP as a new judicial entity was not bound to the debtor's labor agreement unless and until it assumed or adopted that agreement. Until there was such overt conduct by the DIP it was not a "party" to any labor agreement and was not subject to the statutory termination

requirements imposed by Section 8(d) LRMA.[15]

The Kevin Steel court established that a DIP can disaffirm a debtor's labor agreement, but it wasn't until the Second Circuit decided BRAC v. REA Express, Inc., 523 F. 2d 164 (2d Cir. 1975) that the bargaining obligations of a DIP were explained. The REA panel drew an analogy between the bargaining obligations of a DIP and a successor-employer. NLRB v. Burns International Security Service, Inc., 406 U.S. 272 (1972)

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15 29 U.S.C. 158(d), which provides that "no party to [a LMRA-covered] contract shall terminate or modify such contract, unless the party desiring such termination or modification" satisfies detailed notice and other procedural requirements. Most significantly, termination cannot be effected until sixty days have elapsed, after notice has been given, or the termination date originally set in the contract has arrived, whichever occurs later. Id. §158 (d)(4).

The Second Circuit stated that where the DIP's employees are represented by a union it is obligated only to give that labor organization reasonable notice of its proposed terms of employment and to negotiate for a reasonable length of time before putting them into effect.[16] The bargaining agent for the DIP's employees cannot impose the debtor's labor agreement upon the DIP. Yet, the DIP,

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16 523 F.2d at 171. In Burns, this Court stated in dictum, that in certain instances where a "new employer...retain[s] all the employees in the unit,...it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 295. The Second Circuit, in REA, noting that the bankruptcy proceedings had put the union on notice that changes might be necessary to prevent financial collapse limited this Burns exception to situations where "employees are led at the outset by the successor employer to believe that they will have continuity of employment on pre-existing terms." 523 F.2d at 171.

by either expressly assuming or conforming to the terms of the debtor's contract, can thereby become bound to it. In re Public Ledger, Inc., 161 F. 2d 762, 767 (3d Cir. 1947); BRAC v. REA Express, Inc., 523 F.2d at 170 and Truck Drivers Local 807 v. Bohack, 541 F.2d at 320-321.

During each of the proceedings and appeals, instituted since June 30, 1975, the DIP has always acknowledged that it conformed to the terms and conditions of the Agreement between July 30, 1974 and July 18, 1975. In fact, on August 1, 1975, the DIP served and filed an answer and counterclaim wherein it acknowledged that it had assumed the debtor's labor agreement (R. 74a, par. 16). By its conduct it is evident that the DIP elected to assume the debtor's labor agreement and receive the

benefit of the drivers' services rather than face any uncertainty or turmoil that might have followed had it sought to negotiate new terms and conditions for their employment following the filing of the Chapter XI petition. Having elected to acquiesce to the Agreement's terms, the DIP became bound to the Agreement, just as if it had been made by the DIP in the first instance.[17] Thus, the DIP was ineligible, on July 18, 1975, to seek or obtain disaffirmance of the Agreement, and its relationship to the Agreement was subject to the termination procedures of Section 8(d) of the LMRA.

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17 American Anthracite and Bituminous Coal Corp. v. Leonardo Arrevabene, S.A., etal., 280 F.2d 119, 124 (2d Cir. 1960). The DIP moved to reject the Agreement only after it had discharged all of its drivers and obtained, from the bankruptcy court, a broad preliminary injunction order preventing the Petitioner from engaging in any strike activity.

The opinion below cannot be reconciled with either this Court's decision in Burns, the Third Circuit's decision in Public Ledger, or the reasoning of the Second Circuit in REA Express. Moreover, the opinion below-if permitted to stand-will undo what Congress has accomplished over the years, by enacting the LMRA and its amendments, to establish industrial stability.

B. Bankruptcy Court's Review of Arbitrable Grievances.

The clear impact of the court below's erroneous decision is that the federal labor policy favoring arbitration of industrial grievances is to be subservient to Rule 919 (b) of the Rules of Bankruptcy Procedure. The simple filing of a Chapter XI petition will effectively negate the efficacy of the

labor agreement's grievance procedure. What is viewed as a contractual right with a debtor is the subject for a bankruptcy referee's discretion with a DIP.

This is the antithesis of Section 203(d) of the LMRA which provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

Furthermore, in Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960), this Court, defined the primary role of grievance arbitration in promoting and preserving harmonious industrial relations:

> "[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system

> of industrial self-government. Arbitration is the means of solving the unforseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." at 581.

The Second Circuit, first, relegated the Agreement to an unprecedented "limbo" status-neither existent nor non-existent-(App. A, infra, p. 35a) and then incorrectly affirmed a rejection thereof. That court offered two reasons for requiring bankruptcy court approval before arbitration can be undertaken pursuant to an existing labor agreement: (1) judicial control over the

rights and duties of the DIP to protect the creditors, and (2) the court's inability to "see [any] reason why [bankruptcy] court approval must be had for arbitration upon a stipulation (Rule 919(b)) and dispensed with when the arbitration was agreed upon in [an] earlier contract".[18]

Of course, a bankruptcy court must protect the rights of creditors by assuring that the DIP operates the debtor's business to foster satisfaction of outstanding debts. But the court below totally neglected to balance against the creditors rights those of the bargaining unit employees under the Agreement. More fundamentally, however, the court below failed to take into account the fact that grievance arbitration-the

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18 App. A, infra, p. 37a.

cornerstone of industrial self-government-is an essential ingredient of national labor policy. In doing so, the court below also ignored this Court's holding in Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960) that the federal labor policy set forth in Section 203(d) "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given fully play."

The decision below wreaks havoc with the system of self-government devised by management and labor when an employer has DIP status. The bankruptcy judge, at least in the first instance, will become a de facto labor arbitrator, but one who lacks the requisite labor expertise. The court below made no attempt to limit the scope of the

Rule 919(b) requirement.

Presumably, it applies to all arbitrable disputes.[19] In every instance, whichever party wants to process a dispute through grievance arbitration will first have to apply to the bankruptcy court for authorization. This requirement will adversely affect even the individual worker who has had a disagreement with his supervisor, for example over shift selection, and who would have ordinarily submitted the dispute to the grievance machinery for settlement, but who now must arrange for having bankruptcy court authorization and await a favorable determination from that body before the grievance can be processed. This process will seriously impede the quick and fair settlement of minor disputes-

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19 The DIP admits that its disputes with the Petitioner are arbitrable. R. 75a.

one of the chief purposes of grievance arbitration. See Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1497-1507 (1957).

C. Authority of Bankruptcy Court to Determine Grievance Forum.

The court below held that the grievance procedure set forth in the Agreement applies to disputes, between the DIP and Petitioner, that have been authorized for submission to arbitration. However, the lower courts did not determine the proper grievance jurisdiction to hear those disputes. The district court's decision held that if the DIP disagreed with Petitioner's view-that their disputes should be submitted to the Committee-then "the bankruptcy court will have to determine the appropriate committee for arbitration." (R. 149a). The court below affirmed.

Such a procedure for the selection of a grievance forum is misplaced. The issue is not whether the DIP presently agrees with Petitioner on the appropriate grievance forum, it is which forum the Agreement designates as having jurisdiction over these disputes. The Committee is the only grievance tribunal that the Agreement empowers with original jurisdiction to render an award on the disputes between Petitioner and DIP.

The Agreement consists of three sections. Articles 1-39 (R. 15a-34a) constitutes the National Section. Articles 40-68 (R. 37a-55a) are within the Area Section. In addition there is a two page rider which is referred to as the Local Section (R. 63a-64a). The grievance procedure is contained in Articles 8 (R. 22a-25a) and 46 (R. 42a-44a).

The disposition of grievances, other than discharge cases, is referred to in the terminology of "settlement". The Committee has exclusive jurisdiction over all disputes and grievances involving the DIP and Petitioner, except for discharge cases (R. 41a). If a dispute or grievance is settled by majority vote of the labor and management panel-the Committee-its decision is final and binding.[20]

The bankruptcy court does not possess the jurisdictional authority to make the determination of "the appropriate committee" to arbitrate the disputes between DIP and Petitioner. Any judicial inquiry into the arbitration process is pursuant to Section 301(a) LMRA, which empowers "district courts"-not bankruptcy courts-to hear "suits for

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20 Article 46, Section 1(b)(1) of the Agreement (R. 43a).

violation of [collective bargaining] contracts. Just as the bankruptcy court does not possess "jurisdiction over labor disputes" it is not empowered to engage in any procedural interpretation of arbitration agreements.[21]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the present case is of the utmost importance and concern to all employers and unions that are now or will be faced with the continuation of a business operation under Chapter XI, and this petition for a writ of certioriari should be granted.

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21 Truck Drivers Local 807 v. The Bohack Corp., 7 Collier Bankruptcy Cases 485, 91 LRRM 2164 (E.D.N.Y. 1975).

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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TRUCK DRIVERS LOCAL UNION
NO. 807, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Plaintiff-Appellant,

v.

THE BOHACK CORPORATION,

Defendant-Appellee.

Dkt. Nos.
75-7694
76-3003

TRUCK DRIVERS LOCAL UNION
NO. 807, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Petitioner,

v.

HONORABLE JACOB MISHLER,
CHIEF JUDGE UNITED STATES
DISTRICT COURT EASTERN
DISTRICT OF NEW YORK

Respondent.

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Before:

HON. J. EDWARD LUMBARD,
PAUL R. HAYS and
MURRAY I. GURFEIN, Circuit Judges

New York, N. Y. August 9, 1976

JUDGE GURFEIN:

We have before us two consolidated actions: (1) an appeal by Truck Drivers Local Union No. 807 ("the union") from an order of the United States District Court for the Eastern District of New York (Chief Judge Mishler) dismissing the union's petition to confirm a grievance award; and (2) a petition for a writ of mandamus directing the District Court

to dissolve an injunction issued against the union, to stay its remand of certain issues to the bankruptcy judge, and to compel immediate submission of certain issues to the grievance procedure provided for in the collective bargaining agreement. For reasons that appear below, we reverse the district court's grant of a preliminary injunction against the union under our mandamus jurisdiction, and affirm the rest of the district court's order.

In March 1973 the Bohack Corporation ("Bohack") and the union entered into a three-year collective bargaining agreement under the terms of the National Master Freight Agreement and the New Jersey - New York Area General Trucking Supplemental Agreement. On July 30, 1974

Bohack filed a petition under Chapter XI of the Bankruptcy Act, 11 U.S.C. §701 et seq., and by order of the same date was allowed to continue to operate its business as a "debtor-in-possession."[1] At that time, more than 120 members of the union were employed by Bohack as truckdrivers.

On December 16, 1974, four and one-half months after the petition was filed, Bohack decided to terminate most of its operations at the Bohack Square Meathouse and to receive certain food products from Shopwell's warehouse in trucks operated by Shopwell employees who were members of another local union. As a result,

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1 A debtor-in-possession acts with all the powers of a trustee. 11 U.S.C. §742.

more than sixty Bohack truckdrivers lost their jobs. The union immediately filed a grievance against Bohack, contending that Bohack had breached Article 32 of the Master Agreement which purported to limit the right of the Employer to transfer to others work done by members of the local union.[2] At a meeting of the New York City Joint Local Grievance

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2 Article 32 reads in part as follows:

> For the purpose of preserving work and job opportunities for the employees covered by this Agreement, the Employer agrees that no work or services of the kind, nature or type covered by, presently performed, or hereafter assigned to the collective bargaining unit will be subcontracted, transferred, leased, assigned or conveyed in whole or in part of any plant, person or nonunit employees unless otherwise provided in this Agreement.

Committee held in December, Bohack argued that this grievance could not be decided by the Local Committee but was a matter for the national Grievance Committee since it involved an interpretation of the National Master Agreement.[3]

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3 The employer relies on Article 8 of the National Master Freight Agreement, which provides in relevant part, that:

> All factual grievances or questions of interpretation arising under the provisions of the Supplemental Agreement, (or factual grievances arising under the National Master Agreement) shall be processed in accordance with the grievance procedure of the applicable Supplemental Agreement.
> ***
> Any request for interpretation of the National Master Agreement shall be submitted directly to the Conference Joint Area Committee for the making of a record on the matter, after which it shall be immediately referred to the National Grievance Committee. Such request shall be filed with both the Union and Employer Secretaries of the National Grievance Committee with a complete statement of the matter.

Though at first it had found otherwise,[4] the Committee, on rehearing, found on May 16, 1975, that Bohack had violated

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4 After the December hearing, the local committee had rules that an inter-union jurisdictional dispute between this union and another Teamster local representing the Shopwell employees was involved, and referred the dispute to the Teamster Joint Counsel for resolution, as provided for in Article 30 of the Master Agreement. Article 30 provides that:

> In the event that any dispute should arise between any Local Unions, parties to this Agreement, Supplements or Riders thereto or between any local Union, party to this Agreement, Supplements or Riders thereto and any other Union, relating to jurisdiction over employees or operations covered by such Agreements, the Employer and the Local Unions agree to accept and comply with the decision or settlement of the Unions or Union bodies which have the authority to determine such dispute, and such disputes shall not be submitted to arbitration under this Agreement, Supplements or Riders thereto or to legal or administrative agency proceedings. Pending such determination, the Employer shall not be precluded from seeking appropriate legal or administrative relief against work stoppages or picketing in furtherance of such dispute.

Article 32 of the agreement, and entered an award favorable to the union ordering Bohack to cease and desist from having its bargaining unit work subcontracted out. Neither Bohack nor the union had sought permission of the bankruptcy judge to submit the dispute to the grievance procedure.

The next stage in the eventual elimination of all jobs held by Bohack's truckdrivers was Bohack's change in grocery suppliers, from the Filgree Company to the companies of Krasdale and Bozzuto, in May, 1975. The Krasdale deliveries were made by its own drivers, and additional Bohack workers thus lost their jobs.

On May 27, 1975, the union instituted a suit in state court to confirm

the grievance award, which Bohack removed to the federal court. Bohack refused to comply with the award and in June, 1975, when Bozzuto drivers took over its deliveries, more Bohack truckdrivers were out of work. By the end of June, 1975, only 32 members of the union were still employed. The union was advised in late June that Bohack intended to terminate the remaining 32 truckdrivers on July 3, 1975. The union struck and began to picket on June 30, 1975. The same day, on motion of Bohack, the bankruptcy judge (Judge Parente) issued a temporary restraining order against the strike, and on July 16, 1975, he issued a preliminary injunction restraining the union from engaging in picketing or

strikes against Bohack, basing his jurisdiction on Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185.

On July 18, 1975, the remaining 32 workers were terminated. On that day, Bohack also moved for the first time to reject the collective bargaining agreement under § 313 of the Bankruptcy Act, 11 U.S.C. § 713.

The union appealed to the district court from the grant of the preliminary injunction. Chief Judge Mishler signed an order to show cause but struck the provision suspending Judge Parente's preliminary injunction. Chief Judge Mishler informed counsel that he doubted the jurisdiction of the Bankruptcy Court under § 301, and suggested that a

complaint be filed under § 301 in the district court. Apparently no new complaint was filed by Bohack.

The union started a new action, however, pursuant to § 301 (a) 29 U.S.C. § 185(a), to compel Bohack "...to specifically perform its collective bargaining agreement with plaintiff and to submit any grievances between them to grievance procedure." Bohack's answer included a counterclaim seeking arbitration if authorized by the Bankruptcy Court pursuant to Bankruptcy Rule 919(b), discussed infra.

On November 19, 1975, Chief Judge Mishler vacated the preliminary injunction issued by the bankruptcy judge but issued a temporary restain-

ing order against the union.[5] He dismissed the union's petition to confirm the arbitrator's award, and remanded to the bankruptcy judge "the issue of the advisability of granting the debtor leave to arbitrate." A hearing was set for November 26 to decide the employer's motion for preliminary

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5 Judge Mishler's order read, in relevant part, as follows:

> Sufficient cause having been shown therefore, and it appearing the plaintiff is about to commit the acts complained of, to the irreparable injury of defendant, pending the hearing and determination of this motion, plaintiff is hereby restrained and enjoined from conducting a strike, walkout, or work stoppage or establishing a picket line at defendant's various places of business or at the premises of any other party or person doing business with defendant.

injunctive relief. On November 25, Judge Costantino signed an order to show cause why the temporary restraining order should not be dissolved on the ground that it was entered in violation of the Norris-LaGuardia Act, 29 U.S.C. § 101 et seq.

The union's motion to dissolve the temporary restraining order and the employer's motion for preliminary injunctive relief were both heard by Chief Judge Mishler on November 26. He denied the union's motion to dissolve the temporary restraining order and decided to "continue the terms of the t.r.o." issued on November 19, until the bankruptcy judge should decide whether to allow arbitration of the subcontracting dispute under

Bankruptcy Rule 919(b) and whether to permit Bohack to reject its collective bargaining agreement under §313 (1) of the Bankruptcy Act, 11 U.S.C. §173(1).[6]

On December 12, 1975, the union filed a notice of appeal from the judgment dismissing the union's petition to confirm the arbitration award. The union did not appeal from the order continuing the t.r.o. On December 30, 1975, the union filed

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6 This section provides that:

Upon the filing of a petition, the court may, in addition to the jurisdiction powers, and duties conferred and imposed upon it by this chapter -

(1) permit the rejection of executory contracts of the debtor upon notice to the parties to such contracts and to such other parties in interests as the court may designate;

its petition for the writ of mandamus described above. By order of January 16, 1976, the appeal and the petition were consolidated.

I.

The union did not appeal from the district court's grant of injunctive relief against its activities, apparently on the theory that what had been issued remained a non-appealable temporary restraining order. See Grant v. United States, 282 F.2d 165 (2 Cir. 1960). However, the words used are not controlling on whether the order amounts to a grant of preliminary injunctive relief appealable under 28 U.S.C. § 1292(a) when the practical effect of the refusal to dissolve the temporary restraining order is the equivalent of the grant of

preliminary injunctive relief. Morning Telegraph v. Powers, 450 F. 2d 97, 99, (2 Cir. 1971) cert. denied, 405 U.S. 954 (1972); Hoh v. Pepsico, Inc., 491 F.2d 556, 560 (2 Cir. 1974). Accord, Telex Corp. v. International Business Machines Corp. 464 F.2d 1025 (8 Cir. 1972) (per curiam). When the district court extended for an indefinite period of time the terms of the temporary restraining order issued on November 19 and refused to dissolve it, the order became appealable as the grant of a preliminary injunction.[7] However, the union failed to file a timely appeal from this order, and thus we lack appellate jurisdiction to review its validity.

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7 28 U.S.C. § 1292(a)(1).

The union does seek a writ of mandamus, however, directing the district court to vacate its order restraining the union from engaging in activities protected by Section 4 of the Norris-LaGuardia Act, 29 U.S.C. §104. Although such a writ is an extraordinary remedy, and is not merely a substitute for appeal, Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943), we believe in this case the writ should issue because the district court acted beyond its jurisdiction in restraining the union. "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."

Roche v. Evaporated Milk Ass'n, supra. 319 U.S. at 26; Bankers Life & Cas. Co. v. Hollan, 346 U.S. 379, 384 (1953); DeBeers Consol. Mines Ltd. v. United States, 325 U.S. 212 (1945); Ex parte Republic of Peru, 318 U.S. 578 (1943).

The Norris-LaGuardia Act, 29 U.S.C. §§101-115, deprives the federal courts of jurisdiction to issue temporary restraining orders or injunctions in any case "involving or growing out of a labor dispute," except "in strict conformity with the provisions of this chapter." Act, §1, 29 U.S.C. §101. Section 4 of the Act, 29 U.S.C. §104, specifically deprives the federal courts of jurisdiction to issue orders restraining strikes or peaceful "patrolling" such as the picketing enjoined

here. And sections 7 through 9 of the Act, 29 U.S.C. §§ 107-109, impose procedural safeguards including hearing witnesses in open court and a specific finding of irreparable injury to property which public officials are unable to protect, before the issuance of any injunction or temporary restraining order.[8]

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8 Section 7 of the Norris-LaGuardia Act, 29 U.S.C. §107, provides:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect -

The injunctive remedy is sought to be justified, however, under Section 301 of the National Labor Relations Act, 29 U.S.C. § 185, which empowers the district

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(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, associations, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection...

courts to hear "suits for violation of [collective bargaining] contracts." While Section 301 has been held to provide jurisdiction to enjoin protected union activity under certain circumstances, the circumstances are carefully defined. Boys Market Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, held that in aid of its jurisdiction under § 301 to enforce collective bargaining agreements, a district court could enjoin a strike in violation of a contractual "no-strike" clause where the subject of the dispute was covered by a mandatory arbitration clause, and the Court adopted the view that "the employer should be ordered to arbitrate, as a condition of his

obtaining an injunction against the strike." 398 U.S. at 254, quoting dissenting opinion in Sinclair Refining Co. v. Atkinson, 370 U.S. 195, cited with approval in Buffalo Forge Co. v. United Steelworkers of America, 44 U.S. L. W. 5346, 5349 (U.S. July 6, 1976). We have held such an order to the employer to be essential to jurisdiction. Emery Air Freight Corp. v. Local Union 295, 449 F.2d 586, 588-589 (2d Cir. 1971), cert. denied, 405 U.S. 1066 (1972); New York Telephone Co. v. Communications Workers of America, AFL-CIO, 445 F.2d 39, 50 (2d Cir. 1971).

That requirement is of the essence here. For when the employer is not ordered to arbitrate, the union is unable effectively either to arbitrate

or to strike. Such a result is unsupportable as a matter of policy under the Norris-LaGuardia Act.[9] See Buffalo Forge Co. v. United Steelworkers, supra. Since Bohack had not indicated a willingness to abide by the arbitration prior to filing its counterclaim, and since the bankruptcy judge had not ordered the debtor to submit to the grievance procedure, he surely lacked jurisdiction, even if a Bankruptcy

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9 Indeed Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108 provides that:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Court, ever has jurisdiction to make orders under Section 301, to enjoin a strike or picketing. Nor did the district court, even with its limited power to enforce Section 301, have jurisdiction to issue such injunctive relief in view of the withdrawal of jurisdiction from the federal courts in the Norris-LaGuardia Act. In re Third Ave. Transit Corp., 192 F.2d 971, 973, (2 Cir. 1951), clearly held that the Norris-LaGuardia Act restricts the power of a bankruptcy court in reorganization proceedings. Whether or not permission from the Bankruptcy Court was necessary for a valid arbitration, a question we discuss below, there was never an order to the employer to arbitrate which would have

supported jurisdiction under the Boys Market exception to the Norris-LaGuardia Act.

The argument is made that to allow picketing in the case of this financially troubled debtor is to put it out of business. That is, unfortunately, sometimes the sad outcome when a union and an employer cannot come to terms. But the policy of our labor laws is simply to provide rules for the handling of labor disputes, not to prohibit the use of economic power in the resolution of such disputes. By filing under Chapter XI an employer does not become clothed in immunity from union action. As we recognized in Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc. 519 F. 2d 698, (2 Cir. 1975) and Brotherhood of Railway,

Airline and Steamship Clerks, etc. v. R.E.A. Express, Inc. 523 F.2d 164 (2 Cir.), cert. denied, 44 U.S.L.W (U.S. Dec. 9, 1975), the debtor in a bankruptcy proceeding has other means for release from unlivable conditions in a collective bargaining agreement by petitioning for permission to reject the contract. But the power to permit rejection of the agreement in particular circumstances does not confer an antecedent jurisdiction on the court to enjoin picketing in spite of the Norris-LaGuardia Act. We conclude, therefore, that the district court did not have jurisdiction, without ordering arbitration, to enjoin the picketing or other lawful union activity, and hence will grant the writ of mandamus to the district court to dissolve any such order.

We recognize that the passage of time has allowed the collective agreement to expire and that there are no longer any members of the union in the employ of Bohack. We express no views on the remaining rights of the union at this juncture.

II.

The district court denied enforcement of the grievance award on two grounds: first, that the parties had not sought and received permission of the bankruptcy judge to arbitrate, as is required by Rule 919(b) of the Bankruptcy Rules, and second, that the Joint Local Committee which made the award was, under the terms set forth in the Master Agreement,without jurisdiction to decide the dispute. We agree with the district court that enforcement must be

denied because the bankruptcy judge had not approved the submission of the dispute to the grievance machinery, and do not decide whether the Joint Local Committee had jurisdiction.[10]

Rule 919(b) provides that "[o]n stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration." The rule is silent on whether judicial authorization is required where an existing contract provides for arbitration.

The question, thus presented is whether an existing contractual agreement to arbitrate authorizes direct submission of a dispute to arbitration when one of the parties is a

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10 If arbitration should ultimately be ordered, the parties could conceivably agree upon the proper grievance jurisdiction, and therefore we need not decide that issue now.

debtor-in-possession under Chapter XI, or whether the bankruptcy court must "authorize" the arbitration as provided for in Rule 919(b). To answer this question, however, we must first consider whether the agreement to arbitrate is still in effect.

We have concluded that an obligation to arbitrate, solemnly undertaken, is not subject to a unilateral disavowal even by a debtor-in-possession. See L.O. Koven & Brother, Inc. v. Local Union No. 5767, United Steelworkers of America, AFL-CIO, 381 F.2d 196, 203 (3 Cir. 1967). For while such a debtor, as trustee, speaks for the creditors as well as itself, it may not abrogate a contractual obligation save by statutory or judicial permission. Bankruptcy Act §313, 11 U.S.D. §713.

The agreement to arbitrate is itself a contract which creates rights and duties, and its survival in the setting of bankruptcy proceedings has been recognized in this circuit. In Schilling v. Canadian Foreign Steamship Co., Ltd. 190 F. Supp. 462 (S.D. N.Y. 1961), a debtor of the trustee sought to invoke the arbitration clause of their contract when the trustee sued on the debt; the trustee refused to proceed with the arbitration. Nevertheless, the district court ordered the trustee to arbitration, rejecting the argument that Rule 919(b)'s predecessor statute, Section 26 of the Act, 11 U.S.C. § 49, "evince[d] a congressional policy that the trustee in bankruptcy shall have the right to abrogate agreements for

arbitration."[11] 190 F. Supp. at 463.

In Tobin v. Plein, 301 F. 2d 378 (2 Cir. 1962), the trustee in bankruptcy petitioned the referee for leave to commence arbitration proceedings against a former stockholder of the bankrupt, pursuant to an arbitration clause in a contract. The referee granted leave but was reversed by the district court. This court reinstated the referee's order. The issue arose under Section 26 of the Bankruptcy Act quoted above which also provided for the procedure to be used in the appoint-

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11 Section 26 of the Act, 11 U.S.C. §49 reads in part as follows:

(a) The receiver or trustee may, pursuant to the direction of the court submit to arbitration any controversy arising in the settlement of the estate.

ment of arbitrators.[12] The court, in rejecting the argument that the procedure of Section 26 must be applied, noted that "this section is clearly drawn to provide arbitration machinery where no contractual arrangements exists. It does not supersede explicit contractual provisions. Schilling v. Canadian Foreign S.S. Co., Ltd., D.C.S.N.Y., 90 F.Supp. 462" 301 F. 2d at 381.

While Tobin v. Plein is not a holding precisely on point, the clear implication is

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12 Section 26, 11 U.S.C. §49, continued after the portion set forth in note 11, supra, as follows:

(b) Three arbitrators shall be chosen by mutual consent, or one by the receiver or trustee, one by the other party to the controversy, and the third by the two so chosen or, if they fail to agree in five days after their appointment, the court shall appoint the third arbitrator.

that a contractual agreement to arbitrate survives the filing of a petition in bankruptcy.

We have recently held, however, that upon the filing of a Chapter XI petition, statutory requirements precedent to the termination of a collective bargaining agreement by the employer under Section 8 (d) of the National Labor Relations Act, 29 U.S.C. § 158(d), do not prevent its rejection by the bankruptcy court under Section 313(1) of the Bankruptcy Act. Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., supra, 519 F.2d 698; Brotherhood of Railway, Airline and Steamship Clerks, etc. v. R.E.A. Express, Inc. supra, 523 F.2d 164. We reasoned that the status of the debtor-employer is, in some respects, analogous to that of a successor employer

so far as an existing collective bargaining agreement is concerned, insofar as the debtor is a "new juridical entity."

That does not mean that the agreement ceases to exist. It means that for the narrow purpose of resolving otherwise conflicting provisions of the labor and bankruptcy laws "[u]ntil the debtor...assumes the old agreement or makes a new one, it is not a 'party' under section 8(d) to any labor agreement with the union and is simply not subject to the termination restrictions of the section." 519 F. 2d at 704. We went on to hold that Section 313(1) of the Bankruptcy Act permits rejection of a labor agreement, but judge Feinberg was careful to note that "the Bankruptcy Act...does not authorize a debtor-in-possession to ignore its obligations

under the Labor Act any more than it can ignore those imposed by the Internal Revenue Code." 519 F. 2d at 706. We added that "the bankruptcy court must move cautiously in allowing rejection of a collective bargaining agreement." Id. at 707. Of course, the statement that the debtor is not a "party," and the analogy to the successor employer, cannot be taken literally, since neither affirmance nor rejection of the collective bargaining agreement would be possible by one not a party to it. See Countryman, Executory Contracts in Bankruptcy: Part II, 58 Minn. L. Rev. 479, 489 n. 259 (1974).

What we have here, then, is a contract in limbo. It is not an existing contract to be enforced by arbitration without court permission. Yet, if the bankruptcy court

orders arbitration, the contract is of sufficient vitality to support such an order. We conclude that the party seeking to arbitrate under a collective bargaining agreement must seek and receive authorization of the bankruptcy court for other reasons as well.

There must be judicial control over the exercise of the right to arbitrate just as there is over other rights and duties of the bankrupt. For now an additional consideration has been added, the rights of the creditors. See Johnson v. England, 356 F. 2d 44, (9 Cir.), cert. denied, 384 U.S. 961 (1966).[13]

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13 While we do not necessarily agree with all the language or reasoning of the court in In re Muskegan Specialties Co., 313 F.2d 841, (6 Cir.), cert. denied sub nom., International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, AFL-CIO v. Davis, 375 U.S. 832, (1963), we believe it supports our holding that the bankruptcy judge's authorization (properly exercised) is required in order for the arbitration award to be valid.

Moreover, we can see no reason why court approval must be had for arbitration upon a stipulation (Rule 919(b))) and dispensed with when the arbitration was agreed upon in an earlier contract. In either case, the same rights or creditors are involved and the obligation of the bankruptcy court to protect all concerned is the same.

Since the agreement has expired by its terms, however, the scope of any arbitration may be limited. Whether an arbitrator can order a debtor-in-possession to reinstate the employment of men who have been discharged is a question we need not decide. Cf. United Steelworkers of America v. Enterprise Wheel & Car Corp. 363 U.S. 593 (1960).

The bankruptcy judge will have to determine: (1) whether to affirm the contract, or whether the debtor has so conformed to the

contract as to make it binding, see In re Public Ledger, Inc., 161 F. 2d 762, 767 (3d Cir. 1947), cited with approval in REA Express, Inc., supra, 523 F.2d at 170;[14] (2) whether to grant the debtor's petition to reject the agreement as onerous, adhering to our admonition in Kevin Steel to "move cautiously in allowing rejection of a collective bargaining agreement," 519 F. 2d at 707; and (3) whether to order arbitration under its terms in any event, and on what issues.

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14 Judge Mansfield, in the REA case, supra, put the issue in terms of whether the employees were misled by the actions of the debtor-in-possession, noting that "the Chapter XI proceeding, which was widely publicized, put the unions, and REA employees on notice that changes would be required to avert collapse of REA. 523 F. 2d at 171.

It may seem anomalous that we should affirm a remand to decide on whether to reject a contract that, by its own terms, has expired. Issues remain, however, which depend upon the decision on remand. Upon affirmance of the contract, the agreement to arbitrate survives the expiration of the contract as to disputes arising during the term of the contract. See United Steelworkers of America v. Enterprise Wheel & Car Corp., supra. Rejection of the contract is deemed a breach of contract as of the time of filing the Chapter XI petition. 8 Collier on Bankruptcy ¶3.15[7] at 206 (14 ed. 1976). Even if the contract is rejected that does not necessarily mean that arbitration should not be ordered though the issues may be

different.[15] Moreover, if the contract is rejected, the employees become creditors of the estate and may have a claim for damages against the estate; if the contract is affirmed or found to have been assumed, the employees may have a first priority claim for wages and

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15 If the contract is rejected by the bankruptcy court, it will be deemed to have been breached as of the date of filing of the petition under Ch. XI. But like any other unilateral breach of contract, it does not destroy the contract so as to absolve the parties (particularly the breaching party) from a contractual duty to arbitrate their disputes. Cf. Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers International, AFL-CIO, 370 U.S. 254, 262 (1962); In re Phalberg Petition, 131 F.2d 968 (2d Cir. 1942); 9 Williston on Contracts §1023D, at 614 (3d ed. 1967). Hence, the provisions for arbitration could continue to support an order of the bankruptcy judge that the parties arbitrate their dispute, though the priority and status of any arbitration award would be a matter of bankruptcy law for the bankruptcy court to decide.

other fringe benefits.[16] Countryman, supra at 494.

In view of the long time that has elapsed since the filing of the petition, we believe it is in the interests of everyone concerned that the question of whether to reject the collective bargaining agreement should be decided promptly and before any other issues are considered. We agree with Chief Judge Mishler that the bankruptcy judge may proceed to hear witnesses without extensive pretrial discovery. After the decision

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16 We wish to emphasize that we intimate no view on whether Bohack was within the rights under the contract in eliminating the jobs held by the union members. If the court finds that the contract was assumed or affirmed, a claim for wages or other contractual benefits for the period of the contract after employment ceased would arise only if the arbitrator or the court also finds that the contract was breached by the employer's actions after the petition was filed.

has been made on whether or not to affirm the contract, the bankruptcy judge should determine in his discretion whether to order arbitration even before Chief Judge Mishler has ruled upon any petition for review of the decision on affirmance or disaffirmance.

We therefore remand to the district court with a suggestion that the bankruptcy judge be directed to proceed promptly in conformity with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In The Matter of :

THE BOHACK CORPORATION, : Bankruptcy No. 74: B 933

Debtor, :

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THE BOHACK CORPORATION, :

Plaintiff, :

-against- :

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL., :

Defendants. :

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This cause came on for trial before the Court, Honorable C. Albert Parente, Bankruptcy

Judge, presiding and the issues having been duly tried and verdict having been directed for the plaintiff,

IT IS ORDERED AND ADJUDGED that plaintiff's labor agreement with the defendant be, and hereby is, rejected as of July 19, 1975.

/s/ C. Albert Parente
Bankruptcy Judge

Dated: Westbury, N.Y.
May 28, 1976

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In the Matter of	:	
THE BOHACK CORPORATION,	:	Bankruptcy No. 74-B-933
Debtor.	:	
		ORDER
THE BOHACK CORPORATION,	:	
Plaintiff,	:	
-against-	:	
TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL.,	:	
Defendants.	:	

This matter having come on for a hearing before Bankruptcy Judge C. Albert Parente of this Court on September 28, 1976 and Stanley

Shaw, Esq. having appeared for plaintiff and J. Warren Mangan, Esq. having appeared for defendant.

IT IS HEREBY ORDERED that the parties hereto submit the grievances alleging plaintiff's violation of Article 40, Section 4(a), Article 50, Section 2 and Rider paragraph 2, of the prevailing collective bargaining agreement, to arbitration, in accordance with the procedure set forth in Section 26 of the Bankruptcy Act, to determine if plaintiff breached said collective bargaining agreement and to render a finding on damages, if necessary.

Dated: October 15, 1976

/s/C. Albert Parente
Bankruptcy Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In the Matter of :

THE BOHACK CORPORATION, :

Debtor. : Bankruptcy No. 74-B-933

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THE BOHACK CORPORATION, : ORDER

Plaintiff, : ———

-against- :

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL., :

Defendants. :

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This matter having been remanded to the District Court with a suggestion as contained in the opinion of the UNITED STATES COURT OF

APPEALS FOR THE SECOND CIRCUIT - Docket Nos. 75-7694, 76-3003 decided August 9, 1976 that this Court be directed to proceed promptly in conformity with said opinion, and the matter having come on for a hearing on September 28, 1976 and J. Stanley Shaw, Esq. having appeared for the Plaintiff and J. Warren Mangan having appeared for the Defendant, and the matter having been heard by this Court on September 28, 1976; and the Plaintiff having moved for reargument by notice of motion returnable in this Court on October 14, 1976, and said motion for reargument having been heard by this Court on October 14, 1976, and the Court having rendered its decision on September 28, 1976, and having rendered a further decision on October 14, 1976, with respect to the motion

for reargument.

IT IS HEREBY ORDERED that Plaintiff's motion for reargument is hereby granted and upon said reargument the Court adheres to its original decision of September 28, 1976 as modified by this order.

IT IS HEREBY ORDERED that in the discretion of this Court that the parties hereto submit the following issues to arbitration:--

a) The extent of damages to be recovered by the discharged employees upon the rejection of the labor contract between The Bohack Corporation and Truck Drivers Local Union No. 807 - International Brotherhood of Teamsters.

b) The amount and extent of pension, health insurance, welfare, vacation benefits and the value of seniority of each employee

effected by said rejection of the employment contract.

c) The amount of the mitigation of such damages by reason of the subsequent employment of each employee or the receipt of unemployment insurance paid to said employee.

d) The issue of whether or not the contract rejected by the employer should be specifically enforced by the reinstatement of each employee notwithstanding the fact that the contract has expired and;

IT IS ORDERED that all issues determined by the arbitrators be subject to the further order of this Court, as to the status, amount and the validity of such arbitrator's award and it is

FURTHER ORDERED that the arbitrator shall proceed in accordance with the procedures set

forth in Section 26, 11 U.S.C. Section 49.

Dated: October 21, 1976

/s/ C. Albert Parente
Bankruptcy Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In the Matter of :

THE BOHACK CORPORATION, : Bankruptcy No. 74 B 933

Debtor. : 75 C 905
75 C 1191

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THE BOHACK CORPORATION, :

Plaintiff, :

-against- : Memorandum of Decision

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL., :

Defendants. :

----------x April 21, 1977

A P P E A R A N C E S :

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MISHLER, CH. J.

This is a consolidated appeal from two orders of the bankruptcy court, Parente, J., entered on October 15 and 21, 1976.

The facts of this case are set forth in the Second Circuit's opinion in Truck Drivers Local 807 v. Bohack, 541 F.2d 312 (2d Cir. 1976). To provide a proper framework for our discussion, we will summarize briefly the salient events of the Bohack Corporation's ("Bohack") recent, troubled past. In March 1973, Bohack and Truck Drivers Local 807 ("the union") entered into a three-year collective bargaining agreement. At that time, Bohack employed more than 120 members of the union. On July 30, 1974, Bohack filed a

petition for arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. § 701 et seq. An order issued that day allowed Bohack to continue business operations, which then included approximately 150 retail supermarkets, as a "debtor-in-possession." See 11 U.S.C. § 742. Four and one-half months later, on December 16, 1974, Bohack terminated produce, dairy and bakery operations at its Brooklyn warehouse in favor of a contract with an independent wholesaler, leaving 60 Bohack truckdrivers without work. The union filed a grievance alleging Bohack had violated a provision of the collective bargaining agreement that limited the employer's right to transfer to others work done by members of the local union. On May 16, 1975, the Grievance Committee ruled that Bohack had violated article 32 of the Master

Agreement.

Nonetheless, that same month, Bohack changed grocery suppliers. The new suppliers had their own drivers and, consequently, more Bohack drivers lost their jobs. By July 18, 1975, the remaining workers were terminated and that same day Bohack moved to reject the collective bargaining agreement pursuant to § 313 of the Bankruptcy Act, 11 U.S.C. § 713. The union began an action in this court pursuant to § 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), to compel Bohack to perform the collective bargaining agreement. The union also sought to confirm the grievance award, the subject of a state court proceeding that Bohack had removed to the federal court.

On November 19, 1975, this court dismissed the union's petition to confirm the

arbitrator's award, and remanded to the bankruptcy judge "the issue of the advisability of granting the debtor leave to arbitrate." On appeal, the Second Circuit affirmed the remand, although it directed this court to vacate an order restraining the union from picketing Bohack. The banktrupcy judge was instruted to determine:

> (1) whether to affirm the contract, or whether the debtor has so conformed to the contract as to make it binding, see In re Public Ledger, Inc., 161 F. 2d 762, 767 (3d Cir. 1947), cited with approval in REA Express, Inc., supra, 523 F.2d at 170; (2) whether to grant the debtor's petition to reject the agreement as onerous, adhering to our admonition in Kevin Steel to "move cautiously in allowing rejection of a collective bargaining agreement," 519 F. 2d at 707; and (3) whether to order arbitration under its terms in any event, and on what issues.

541 F.2d at 320-21 (footnote omitted).

Several months prior to the Second Circuit's decision, on May 19, 1976, Bankruptcy Judge

Parente had entered an order rejecting the collective bargaining agreement, which had expired on March 31, 1976, as onerous and burdensome to the debtor. On October 15, 1976, acting pursuant to the Second Circuit's remand, Judge Parente directed the union to submit its grievances with the debtor-in-possession "to arbitration, in accordance with the procedure set forth in Section 26 of the Bankruptcy Act, to determine if [the debtor-in-possession] breached said collective bargaining agreement and to render a finding on damages, if necessary." On October 21, 1976, after hearing reargument, Judge Parente signed a second arbitration order, directing the parties to submit the following issues to arbitration:

> a) The extent of damages to be recovered by the discharged employees upon the rejection of

the labor contract between The Bohack Corporation and Truck Drivers Local Union No. 807 - International Brotherhood of Teamsters.

b) The amount and extent of pension, health insurance, welfare, vacation benefits and the value of seniority of each employee effected [sic] by said rejection of the employment contract.

c) The amount of the mitigation of such damages by reason of the subsequent employment of each employee or the receipt of unemployment insurance paid to said employee.

d) The issue of whether or not the contract rejected by the employer should be specifically enforced by the reinstatement of each employee notwithstanding the fact that the contract has expired....

In addition, this order provided that

> issues determined by the arbitrators be subject to the further order of this Court, as to the status, amount and the validity of

> such arbitrator's award and it is
>
> FURTHER ORDERED that the arbitrator shall proceed in accordance with the procedures set forth in Section 26, 11 U.S.C. Section 49..

Both Bohack and the union filed notices of appeal from the orders. On November 19, 1976 Judge Parente stayed arbitration pending the decision of this court.

REJECTION OF THE COLLECTIVE BARGAINING AGREEMENT

Local 807 argues that Bohack failed to establish that the labor contract was onerous and burdensome and, therefore, the bankruptcy court erred in granting the petition to reject the agreement. Moreover, aside from the question of burdensomeness, the union contends that the debtor-in-possession became a party to the agreement by expressly or implicitly adopting its terms.

In Shopmen's Local 455 v. Kevin Steel Prod., Inc., 519 F.2d 698 (2d Cir. 1975), the Second Circuit touched on the considerations that must inform the decision to allow rejection of a collective bargaining agreement:

> [A] showing that the employer is not improperly motivated merely by a desire to rid itself of the union and its adherents,... convincing proof of the company's financial condition, the source of its difficulties and the benefits to be gained by rejecting the contract, and a careful weighing of the equities against rejection, including the loss of intangible employee rights.

Id. at 707. The desire of the debtor-in-possession to improve its financial status is not, by itself, a valid reason for allowing rejection. Id. See Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, 523 F.2d 164 (2d Cir.), cert. denied, ____U.S.____, 96 S. Ct. 451 (1975).

See generally Miller, Bankruptcy Law Introduction, The Second Circuit Review, 1974-1975 Term, 42 Brooklyn L. Rev. 709 (1976); 42 Brooklyn L. Rev. 726 (1976).

In this case, the bankruptcy judge properly allowed rejection of the collective bargaining agreement. Indeed, the choice presented was a simple one. If the contract was not rejected, the debtor would not be able to reorganize. Either the debtor was relieved of the contract or the entire business would collapse.

According to the testimony of Joseph Binder, the president of Bohack prior to the filing of the Chapter XI petition and its current executive vice-president, as of January 1974, Bohack had approximately 140 stores in operation. These stores were supplied by warehouses located at a

central terminal in Brooklyn, known as Bohack Square. There was a grocery warehouse, meat warehouse, dairy warehouse, produce warehouse and delicatessen commissary. Approximately 50% of the 37 acres of terminal property were used for the warehouse and distribution operation. Bohack annually paid one and one-half million dollars for the carrying charges, maintenance and taxes on that portion of the terminal.

After the filing of the Chapter XI petition, the Creditors Committee directed Bohack to reduce the number of its retail outlets. The closings began in earnest in November 1974. By November, 1975, the company held 72 retail stores, essentially now a regional chain, down from a high of 200 stores in 1973, when it qualified as a general supermarket. The closings

substantially reduced the volume of merchandise handled by the warehouse, which created a "negative cash flow."[/1] (Tr. Nov. 17, 1975, at 29-30). As the store closing increased, the Creditors Committee directed Bohack to rid itself of the terminal, or face complete liquidation.

In December 1974 and January 1975, the produce, dairy and grocery warehouses were closed. To meet its dairy and produce needs, Bohack negotiated a supply agreement with a wholesaler, Shopwell, Inc. The debtor requested that its drivers be allowed to pick up the merchandise from Shopwell, but the wholesaler flatly refused, indicating "they had enough problems without getting involved with another union" (Tr. Nov. 17, 1975, at 39). Essentially the same pattern was repeated as Bohack closed the remaining

warehouse operations and turned to wholesalers to meet its supply needs. Eventually, all the warehouses were closed and Bohack completely vacated the terminal except for some maintenance equipment and vehicles.

The savings to Bohack from the terminal closing totaled approximately two million dollars, including $925,000 saved by eliminating the labor contract and approximately one million dollars then being lost annually by the warehouse operation (Tr. Nov. 17, 1975, at 68-74). There was testimony, accepted as the opinion of an expert by Judge Parente, that a Chapter XI re-organization was impossible if the debtor continued to operate the warehouse (Tr. Nov. 17, 1975, at 81-82). Indeed, the union did not take issue with Bohack's position that the warehouse had to close (Tr. Nov. 17, 1975, at 70-71). The

problem, of course, was that the new suppliers refused to use the Bohack drivers. The debtor, who was in an extremely precarious financial position-aside from other Chapter XI losses, it was unable to purchase the $2,500,000 worth of merchandise necessary to sustain its then current weekly sales of $3,200,000-hardly had the bargaining power to force the new suppliers to use Bohack drivers. And, obviously, a company that had lost ten million dollars up to the date of the Chapter XI petition (Tr. Nov. 17, 1975, at 75-76) could not undertake a re-organization while paying a million dollars annually to truck drivers for whom there is no work. Thus, the point is not, as the union argues, that the transportation costs to Bohack under the new agreements are the same as under the Local 807 contract, but that circumstances left Bohack with a costly

and entirely superfluous labor agreement. See Matter of Cheney Bros., 12 F. Supp. 605, 609 (D. Conn. 1935). This is not a case of rejection of a labor contract to improve the debtor's financial position. It is, rather, tne hard but clear choice between termination of a collective bargaining agreement involving a hundred and twenty workers or the collapse of a company that employs more than 2,000 men and women.

Moreover, Binder's testimony establishes that the company was in no way motivated by a desire to rid itself of the Local 807 contract. At every stage of the warehouse closing, Bohack attempted to negotiate agreements with its new wholesalers that would provide work for the union. In one instance, the contract with Bozzuto, a grocery supplier, for a time allowed the

union to deliver the groceries from Bohack Square to the retail stores after the foodstuffs were trucked in by Bozzuto. Finally, transportation costs under the new agreements do not provide Bohack with a discernible advantage over the collective bargaining contract (Tr. May 19, 1975, at 33).

The union also claims that, aside from the issue of burdensomeness, Bohack either expressly assumed or adopted the terms of the collective bargaining agreement. It points out that between the filing of the Chapter XI petition and the rejection of the contract, Bohack employed Local 807 drivers, paid the agreed wage rates, recognized seniority, contributed to the union's health and pension plans, and engaged in grievance proceedings. In the union's view, "the debtor so conformed to the

contract as to make it binding." Truck Driver's Local 807, supra at 321, citing In re Public Ledger, Inc., 161 F.2d 762, 767 (3d Cir. 1947).

In In re Public Ledger, Inc., supra, a Chapter X re-organization that involved the implied assumption of a labor contract by the trustee in bankruptcy, the circuit court cited several circumstances giving rise to the adoption of a contract:

> [T]he term adoption is usually applied...to a situation in which a receiver either (a) indicates an intention fully to perform the obligations of the insolvent, (b) indicates an intention to insist on full counter-performance, or (c) acts in such a way with reference to a contract...that fairness to the solvent party requires that the consequences of adoption be attributed to his action....

Id. at 767, quoting Clark, Foley and Shaw,

Adoption and Rejection of Contracts and Receivers, 46 Harv. L. Rev. 1111, 1123 (1933). In REA Express, Inc., supra, Judge Mansfield framed the issue as whether the debtor-in-possession misled the employees into believing "that they will have continuity of employment on pre-existing terms." Id. at 171. These standards imply affirmative conduct that is inconsistent with a later move to reject entirely the contract. In most circumstances, merely continuing to adhere to the labor agreement for a period following the filing of a bankruptcy petition should not constitute assumption of the contract. The stricter rule, advocated by the union, would result in rejection of labor contracts at the time the bankruptcy petition is filed even though the need for rejection is not yet apparent. Moreover,

a reasonable amount of time is necessary to evaluate the financial condition of the bankrupt and then to formulate a plan for re-organization. See In re American National Trust, 426, F.2d 1059, 1064 (7th Cir. 1970); 8 Collier on Bankruptcy ¶3.15[6], at 204 (14 ed. 1976).

Here, the conduct of the debtor following the Chapter XI petition was quite inconsistent with an assumption of the labor agreement. In the first place, the financial deterioration of the company, concomitant with the Chapter XI proceeding, put the union on notice that changes would be necessary to avert collapse of the supermarket chain. See REA Express, Inc., supra at 171. Within four and one-half months of the Chapter XI petition, Bohack had laid off half of its drivers. Indeed,

the union sought arbitration, claiming that Bohack had breached the collective bargaining agreement. Despite the Grievance Committee's finding in favor of the union, Bohack continued to close down warehouses and lay off drivers. The same day that the company moved to reject the labor agreement, the remaining Bohack drivers were terminated. These actions are hardly those of a company that intends to complete fully a labor agreement and nor could there have been any misunderstanding of the debtor's fidelity to the terms of the agreement. Survival, not contract, had the highest priority.

ARBITRATION

Both parties raise objections to the bankruptcy judge's orders directing arbitration. The debtor contends that rejection

of the contract mooted the need for arbitration and that Local 807 waived its right to arbitrate by submitting a claim for damages to the bankruptcy court as an administrative claim. The union argues that the bankruptcy judge erred in ordering arbitration pursuant to the grievance procedure of §26(b) of the Bankruptcy Act, 11 U.S.C. §49(b), since the collective bargaining agreement contains a grievance mechanism. It also contends that any grievance award is not subject to review by the bankruptcy judge as to "the amount and validity of that award."

It is important to recognize at the outset that two distinct, although not necessarily incompatible, policy considerations exist in this case. One involves the broad equitable

powers and discretion vested in the bankruptcy court, giving it the ability to protect and administer the estate for the benefit of both creditors and insolvent. 11 U.S.C. § 11. See In re Westec Corporation, 449 F.2d 243, 244 (5th Cir. 1971); 1 Collier on Bankruptcy ¶2.50 et seq. (14th ed. 1976). Among the powers exercised by a bankruptcy court within its equity jurisdiction are the allowance and disallowance of claims. 11 U.S.C. § 11(2). The Supreme Court has held that

> a bankruptcy court has full power to inquire into the validity of any claim asserted against the estate and to disallow it if it is ascertained to be without lawful existence. Lesser v. Gray, 236 U.S. 70, 35 S. Ct. 227, 59 L.Ed. 471.

> And the mere fact that a claim has been reduced to judgment does not prevent such an inquiry. As the merger of a claim into a judgment does not change its nature so far as provability is concerned, Boynton v. Ball, 121 U.S. 457, 7 S. Ct. 981, 30 L. Ed. 985, so the court may look behind the judgment to determine the essential nature of the liability for purposes of proof and allowance. Wetmore v. Markoe, 196 U.S. 68, 25 St. Ct. 172, 49 L.Ed. 390, 2 Ann. Cas. 265.

Pepper v. Litton, 308 U. S. 295, 305-06, 60 S. Ct. 238, 244-45 (1939).

The other consideration present in this case is the federal labor policy favoring arbitration "as the means of resolving disputes over the meaning and effect of collective-bargaining agreements." Nolde Brothers, Inc. v. Local 358, Bakery & Confectionery Workers, 45

U.S.L.W. 4251, 4254 (U.S. Mar. 7, 1977). The grievance machinery of a collective bargaining agreement, a part of the on-going collective bargaining process, "is at the very heart of the system of industrial self-government." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581, 80 S. Ct. 1347, 1352 (1960). Moreover, courts generally defer to the arbitrator's interpretation of an agreement.

> The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment.... The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

Id. at 582-83, 80 S. Ct. at 1352-53. Plenary review by courts of the merits of an arbitrator's decision would render meaningless a contractual provision that the arbitrator's decision is final.

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 599, 80 S.Ct. 1358, 1362 (1960).

The emphasis placed on arbitration as a means of preserving labor peace, and the unique role of the bankruptcy court in protecting both creditor and insolvent,

are principles that may be consistently animated in this case. To begin with, rejection of a collective bargaining agreement by a bankruptcy court does not obviate the need for arbitration. The Second Circuit was quite specific on this point in its Bohack opinion, stating in a footnote that rejection of the labor agreement "does not...absolve the parties ...from a contractual duty to arbitrate their disputes." 541 F.2d at 321 n.15. See Nolde Brothers, Inc. v. Local 358, Bakery & Confectionery Workers, supra. Even in the context of a bankruptcy proceeding, the unique role and special expertise of the arbitrator may be of invaluable assitance to the bankruptcy judge and may serve to avoid unnecessary conflict between labor union and debtor.

See L.O. Koven & Brother, Inc. v. Local 5767, United Steel, 381 F.2d 196 (3d Cir. 1967).[12]

This is not to say, however, that in ordering arbitration a bankruptcy judge can relinquish to the arbitrator decisions that touch on special bankruptcy interests. For example, it has been held an abuse of discretion for a bankruptcy court to allow an arbitrator to decide the question of the preference of the union's claims with respect to other creditors of the bankrupt. Johnson v. England, 356 F.2d 44, 52 (9th Cir.), cert. denied, 384 U.S. 961, 86 S.Ct. 1587 (1966). See also In re Muskegon Motor Specialities Co., 313 F.2d 841 (6th Cir.), cert. denied, 375 U.S. 832, 84 S.Ct. 51 (1963). Thus,

in deciding whether a grievance or claim arising under a rejected collective bargaining agreement is appropriate for arbitration, the touchstone is whether arbitration will preserve labor peace, bring to bear the expertise of the arbitrator on issues such as working conditions or shop practices, and, at the same time, avoid usurption of the bankruptcy court's critical role in the re-organization proceeding. With these principles in mind, we turn to an examination of the bankruptcy court's orders directing arbitration.[13]

1. The Order of October 21

The bankruptcy judge's arbitration order does not satisfy entirely the above criteria. The first three issues referred to the arbitrator, which involve the amount of damages suffered by the employees

as a result of the rejection, are appropriate for arbitration. The labor agreement specifies that "[a]ll factual grievances or questions of interpretation" arising under the contract must be the subject of a grievance proceeding. (National Master Freight Agreement, article 8). A broad arbitration clause such as this encompasses every grievance unless the dispute is specifically excluded. International Union of Elec., Radio & Mach. Workers v. General Electric Co., 332 F. 2d 485, 488 (2d Cir.), cert. denied, 379 U.S. 928, 85 S.Ct. 324 (1964); Publishers' Ass'n of New York City v. New York Mailers' Local Six, 317 F.2d 624, 625 (2d Cir. 1963), vacated

on other grds, 376 U.S. 775, 84 S.Ct. 1132 (1964). Moreover, aside from the presumption of arbitrability, the discharge and other claims of the employees are matters involving interpretation of the contract. See General Teamsters, Chauffeurs & Helpers v. Blue Cab Co., 353 F. 2d 687, 690 (7th Cir. 1965). The fact that working conditions or shop practices are not directly at issue does not mean the special expertise of the arbitrator is of no value. For example, valuing seniority rights under the unfulfilled portion of the collective bargaining agreement, as well as ascertaining the mitigating value of the new seniority rights of

terminated employees who subsequently obtained employment, does not appear to be simply a matter of dollars and cents, rather, it inovlves knowledge of the likelihood of attrition and advancement of employees within the industry and an interpretation of contract provisions respecting seniority rights. See Nolde Brothers, Inc., supra (severance pay); Straus-Duparquet, Inc. v. Local 3, Int. Bro. of Elec. Wkrs., 386 F. 2d 649, 650 (2d Cir. 1967) (vacation claims); International Longshoremen's Ass'n v. New York Shipping Ass'n, 403 F.2d 807 (2d Cir. 1968) (medical services). Finally, labor peace is a legitimate consideration. The debtor is still in business and, as the Second Circuit

made clear, the union has the right to picket the supermarket chain, which could have disastrous consequences for the re-organizing company. Compare In re Muskegon Motor Specialties Co., supra at 843.

The bankruptcy judge, however, erred in directing the arbitrator to decide whether the rejected agreement should be enforced by re-instatement of each employee. True, in a non-bankruptcy context, this issue would be appropriate for arbitration. But in the context of a Chapter XI arrangement, an arbitrator's decision on this point will affect interests consigned to the bankruptcy court, specifically, whether employment of the Local 807 drivers is "onerous and

burdensome" to the debtor-in-possession. Indeed, in allowing rejection of the contract, the bankruptcy judge found that Bohack could not attain financial viability and at the same time employ Local 807 drivers. If the arbitrator is now allowed to re-instate terminated employees, the rejection of the contract becomes meaningless.[14]

In addition, we disagree with the order of October 21, 1976, with respect to the provision that all issues determined by the arbitrators are subject to review by the bankruptcy court "as to the status, amount and the validity of such arbitrator's award." The Second Circuit specifically limited the bankruptcy judge's authority over an arbitration award to determining "the

priority and status" of the award as a matter of bankruptcy law. Truck Drivers Local 807 v. Bohack Corp., supra at 321 n. 15. No mention was made of discretion to change the amount awarded or inquire into the validity of such an award. As pointed out earlier, questions of interpretation of the contract are for the arbitrator, not the courts. Indeed, by ordering arbitration, the bankruptcy judge implicitly acknowledged that the arbitrator possesses special expertise and competence in resolving labor grievances. There is no point to arbitration proceedings if a bankruptcy judge, lacking experience in the collective bargaining process, undertakes a plenary review of the arbitrator's decisions concerning areas where the arbitrator's knowledge and experience

are far superior. Once an award is made, however, its status and priority are questions for the special expertise of the bankruptcy court, which may then relegate the claims of the union to a proper place in the framework of the re-organization.

Finally, the union contends that the contract controls the question of the grievance procedure, not §26 of the Bankruptcy Act. We agree. The agreement to arbitrate survives the filing of the bankruptcy petition. Tobin v. Plein, 301 F.2d 378 (2d Cir. 1962), the expiration of the collective bargaining contract, Nolde Brothers, Inc., supra, and the rejection of the labor agreement, Truck Drivers Local 807, supra. If the contractual duty to arbitrate survives rejection, there is no reason why the grievance pro-

cedures established by the parties should not also survive. Moreover, in Tobin v. Plein, supra, the Second Circuit rejected the argument that arbitration proceedings ordered by a bankruptcy court must be governed by §26 of the Bankruptcy Act:

> [T]his section is clearly drawn to provide arbitration machinery where no contractual arrangements exist. It does not supersede explicit contractual provisions.

301 F.2d at 381; citing Schilling v. Canadian Foreign S.S. Co., 190 F. Supp. 462 (S.D.N.Y. 1961).[15] Here, the collective bargaining agreement contains detailed procedures for the arbitration of grievances arising under the agreement. These provisions govern the arbitration directed by the bankruptcy court.[16]

2. The Order of October 15

A confusing situation exists because of the October 15 order signed by Judge Parente. In that order, Local 807 was directed to submit its grievances with the debtor "to arbitration, in accordance with the procedure set forth in §26 of the Bankruptcy Act, to determine if [the debtor-in-possession] breached said collective bargaining agreement and to render a finding on damages, if necessary." The subsequent order of October 21 only directed arbitration on specific issues, and did not mention arbitration of the issue of whether the collective bargaining agreement was breached. Since both orders are appealed, we will assume that the second order did not vacate the first one.

The question is whether, in view of

the rejection of the collective bargaining agreement, it is necessary to determine whether the agreement was breached by the employer in the months following the filing of the bankruptcy petition and prior to rejection. Had the contract been assumed or affirmed,

> a claim for wages or other contractual benefits for the period of the contract after employment ceased would arise only if the arbitrator or the court also finds that the contract was breached by the employer's actions after the petition was filed.

Truck Drivers Local 807, supra at 321 n.16. Rejection of the contract, however, operates as a unilateral breach of the contract at the time of filing the Chapter XI petition. 11 U.S.C. § 103(c). See Truck Drivers Local 807, supra at 321, 8 Collier on

Bankruptcy ¶3.15[7], at 206 (14 ed. 1976). Thus, as of July 30, 1974, the date of the Chapter XI petition, the collective bargaining agreement was terminated by Bohack. Whether Bohack was within its rights under the contract in eliminating jobs is a moot question. The only issue that remains is whether the employees suffered damages as a result of the rejection and, if so, how much. See 8 Collier on Bankruptcy ¶3.15 [10], at 208 (14 ed. 1976). Any finding of damages would, of course, be diminished by salaries paid to union members after filing of the petition, as well as by any wages and rights obtained from employment after termination and during the remainder of the period covered by the collective bargaining agreement.

This analysis rests, in part, on the pre-Chandler Act doctrine, judicial in origin , that the filing of a bankruptcy petition is an anticipatory breach of the bankrupt's executory contracts. City Bank Farmers Trust Co. v. Irving Trust Co., 299 U.S. 433, 440, 57 S.Ct. 292, 295 (1937); S & W Holding Co. v. Kuriansky, 317 F.2d 666, 668 (2d Cir. 1963). The nonbankrupt party had the option to treat the contract as breached and seek damages. The enactment of the Chandler Act in 1938, however, gave the trustee or receiver the option to assume or reject executory contracts of the bankrupt, 11 U.S.C. §713(1), and no mention was made of the anticipatory breach decision. See Countryman, Executory Contracts in Bankruptcy: Part II, 58 Minn. L. Rev. 479, 520 (1974). A pre-Chandler Act decision

of the Second Circuit presaged the effect on the anticipatory breach doctrine of this congressionally authorized option:

> A trustee in bankruptcy is entitled to a reasonable opportunity to determine whether to adopt or reject an executory contract. If he adopts it and performs the bankrupt's duties thereunder, he can insist upon performance by the other party. While the trustee still has the matter of adoption under advisement, it may be assumed that he could restrain the other party from disposing of the subject matter of the contract or otherwise acting in a manner to impair the trustee's option to adopt the contract.

Matter of United Cigar Stores Co. of America, 89 F.2d 3, 6 (2d Cir. 1937) (Swan, J.). Accord, Matter of Gulfco Investment Corp., 520 F. 2d 741, 743 (10th Cir. 1975).

The concept of bankruptcy-as-anticipatory

breach nonetheless underpins the apparent fiction that rejection of the executory contract is a breach of the contract as of the date of filing of the petition. If the contract is rejected,

> the bankrupt's anticipatory breach is never cured and the conduct of the other party in dealing with the subject-matter of the contract in the meantime has only resulted in mitigating the damages caused by rejection.

In Matter of Cigar Stores, supra at 6. Thus, in the present case, the filing of the Chapter XI petition was an anticipatory breach of the collective bargaining agreement, although the union could not assert the breach against the debtor-in-possession. 6 Colliers on Bankruptcy, ¶3.23, at 576-78 (14 ed. 1972). Once the contract is rejected, the anticipatory breach could never be "cured," and the question of violations of the labor contract

following the filing of the petition became academic. The only issue left by the rejection is damages, as mitigated by the conduct of the parties following the Chapter XI petition.

In sum, the order of the bankruptcy court allowing rejection is affirmed. The October 21 arbitration order is affirmed insofar as it directs arbitration on the three issues involving damages resulting from the rejection. Otherwise, the order of October 21 is reversed, with directions to proceed in accordance with this opinion as to procedures for arbitration and review of any arbitration award. The order of October 15 is reversed and vacated.

/s/ Jacob Mishler
U.S.D.J.

F O O T N O T E S

/1 Prior to the filing of the Chapter XI petition, Bohack's merchandise volume from its stores was approximately $300,000,000 a year. By November 1975, the volume had dropped to $165,000,000 per year (Tr. Nov. 17, 1975, at 38).

/2 The debtor's heavy reliance on Allegaert v. Perot, 76 C 7235 (2d Cir. Jan. 25, 1977), in arguing against arbitration, is misplaced. At issue there was the arbitrability, not of labor disputes, but of claims arising under the securities laws, which implicated the federal policy favoring determination of stock fraud questions in the federal courts. Slip. op. at 1531.

/3 The debtor contends that, "by filing its claim in the Bankruptcy Court as an administrative claim, 807 has waived its right to seek the same remedy in any other forum." For a number of reasons, we find this argument lacks merit. In the first place, in the context of a bankruptcy proceeding, waiver should not be a controlling consideration in ordering arbitration. Rather, the bankruptcy

court must decide on the desireability of arbitration, taking into account the intent of one or both parties to avoid arbitration. The powers of a bankruptcy court to order arbitration are sufficiently broad to overcome a waiver by one of the parties. Second, courts have held that filing an unfair labor practice charge with the National Labor Relations Board does not waive the right to arbitration of a grievance involving the same facts. E.g., Amalgamated Local 55 v. Metal & Alloy Div., 397 F.Supp. 667, 670 (W.D.N.Y. 1975); Glass Bottle Blowers Ass'n v. Arkansas Glass Container Corp., 183 F.Supp. 829, 830-31 (E.D. Ark. 1960), aff'd 286 F. 2d 431 (6th Cir.), cert. denied, 366 U.S. 930, 81 S. Ct. 1651 (1961). Here, as in those cases, the union was attempting to explore all possible means of redress and did not act in a manner inconsistent with arbitration. See Luckenbach Overseas Corp. v. Curran, 398 F.2d 403, 405 n. 3 (2 Cir. 1968); Chatham Shipping Co. v. Fertex S.S. Corp., 352 F.2d 291, 293 (2d Cir. 1965). Finally, the debtor has failed to make any showing of prejudice resulting from the filing of the administrative claim. See ITT World Communications Inc. v. Communications Workers of America, 422 F.2d 77, 82-83 (2d Cir. 1970).

/4 In addition, an award of the arbitrator directing re-instatement necessarily is

an equitable remedy. The Bankruptcy Act, however, "in its present form deals only with claims which can be converted to money." Countryman, Executory Contracts in Bankruptcy: Part II, 58 Minn. L. Rev. 479, 565-66 (1974).

/5 Rule 919 of the new Bankruptcy Rules provides in pertinent part:

> (b) Arbitration. On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.

This rule also appears to be directed at disputes where contractual provisions do not exist.

/6 The question still remains as to the proper grievance jurisdiction under the collective bargaining agreement. In our memorandum of decision and order, dated November 19, 1975, we concluded that the grievance, as originally presented to the Joint Local Committee, "was a matter outside its jurisdiction and the proceedings upon which it was based, a nullity." 74 B 933, at 11 n.10 (nov. 19, 1975). The union, in response to the Second Circuit's suggestion that "the parties could conceivably agree upon the proper grievance jurisdiction," 541 F.2d at 319 n.10, has withdrawn its

allegation of a violation of article 32 of the Agreement. In its view, this means that "the Committee is the [proper] grievance tribunal." If the debtor disagrees, the bankruptcy court will have to determine the appropriate committee for arbitration.

* * * *

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 306, 550 -- September Term, 1977

Argued December 1, 1977 Decided December 14, 1977

Docket No. 77-5013, 77-5014

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THE BOHACK CORPORATION,

Plaintiff-Appellee-Appellant,

-against-

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.,

Defendants-Appellants-Appellees.

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Before MOORE and GURFEIN, Circuit Judges and BONSAL, District Judge.*

J. WARREN MANGAN, Long Island City, New York (O'Connor, Quinlan & Mangan, P. C., Long Island City, New York, of counsel), for Defendant-

* Hon. Dudley B. Bonsal, United States District Judge for the Southern District of New York, sitting by designation.

Appellant-Appelle TRUCK DRIVERS LOCAL UNION NO. 807.

JESSE I. LEVINE, New York, N.Y. (Shaw and Levine, New York, N.Y. of counsel), for Plaintiff-Appellee-Appellant.

PER CURIAM:

The matter is before us again on appeal from orders of the District Court for the Eastern District of New York (Chief Judge Mishler) entered after the remand of this Court on the earlier appeal reported in 541 F. 2d 312 (1976). We affirm on the opinion of Chief Judge Mishler below, issued on appeals from orders of Bankruptcy Judge Parente.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of December one thousand nine hundred and seventy-seven.

Present: HON. LEONARD P. MOORE
HON. MURRAY I. GURFEIN
Circuit Judges

HON. DUDLEY B. BONSAL
District Judge

In the Matter of: THE BOHACK CORPORATION, Debtor,	:	
THE BOHACK CORPORATION, Plaintiff-Appellee-Appellant, V.	:	77-5013 77-5014
TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA (Local 807) Defendants-Appellants-Appellees.	:	

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the orders of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

By /s/ ARTHUR HELLER,
Deputy Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of February, one thousand nine hundred and seventy-eight.

Present: HON. LEONARD P. MOORE
HON. MURRAY I. GURFEIN
HON. DUDLEY B. BONSAL

Circuit Judges

THE BOHACK CORPORATION,		
Plaintiff-Appellee,	:	
vs.	:	77-5013
TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et. al.	:	
Defendants-Appellants.	:	

A petition for a rehearing having been filed herein by counsel for the appellants.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

By /s/ IDA SMYER
Staff Attorney

APPENDIX I

This case involves the interpretation and application of the following statutes:

1. Section 313(1) of the Bankruptcy Act, 11 U.S.C. 713(1):

> "Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it-
>
> (1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate;"

2. Section 8(d) of the Labor Management Relations Act, 29 U.S.C. 158(d):

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith

with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification-
(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
(2) offers to meet and confer with the other party for the

purpose of negotiating a new contract or a contract containing the proposed modifications;
(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract has been superseded as or ceased to be the representative of the

employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Concilliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and concilliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

3. Section 203(d) of the Labor Management Relations Act, 29 U.S.C. 173(d):

> (d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

4. Rule 919(b) of the Rules of Bankruptcy Procedure:

> (b) Arbitration. On stipulation the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.

5. Section 301(a) of the Labor Management Relations Act, 29 U.S.C. 185(a)

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district

> court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.